CO/2116/2014

Neutral Citation Number: [2015] EWHC 1980 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Monday, 18 May 2015

B e f o r e:

MR JUSTICE SINGH

Between:
ABRAHA

Appellant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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(Official Shorthand Writers to the Court)

Mr A Goodman (instructed by Leigh Day) appeared on behalf of the **Appellant**

Ms K Apps (for judgment) and **Ms J Anderson** (for hearing) (instructed by the Government Legal Department) appeared on behalf of the **Respondent**

J U D G M E N T
(Approved)

1. MR JUSTICE SINGH:

2. Introduction

3. This case has had an unusual procedural history. The claimant, who is an Eritrean national, was detained by the Secretary of State pursuant to immigration powers between 6 November 2011 and 6 August 2014, a period of 2 years and 9 months. He commenced these proceedings by way of judicial review on 8 May 2014, at which time the main focus of the claim was to secure his release from detention. The substantive hearing of that claim was to be heard by me on 6 August 2014. However, on the afternoon of the previous day, the Secretary of State said that she had decided to release the claimant. I therefore adjourned the hearing on 6 August. The claimant was released from detention on bail later that same day.

4. An application for the claimant's costs was made to me on 18 September 2014 which I refused at that time. I also made consequential directions for the progress of this claim for past unlawful detention, as it has now become. The claimant submits that although he was initially detained lawfully on 6 November 2011, there came a point when his detention became unlawful. He submits that that point came in July 2012 but, in the alternative, suggests other dates by which time his detention had become unlawful: December 2012, March 2013, or November 2013. Alternatively, he invites the court to specify some other date. Accordingly, he seeks a declaration and also damages for false imprisonment. It is common ground that the issue before me is one of liability and that if it should become relevant the question of quantum should be adjourned for determination if it cannot be agreed between the parties.

5. This case was heard by me on 24 and 25 February 2015. At the end of the hearing I indicated that I intended to give my judgment on 27 February. However, in the

meantime, on 26 February, counsel for the Secretary of State quite properly filed and served further documents, a note by counsel and a witness statement by Mrs Ann Brewer in another case concerned with Eritrea called Zeregegis.{" Counsel for the claimant had very limited time in which to consider and respond to those documents but made commendable efforts to do so late on the evening before judgment was due to be given.

6. When I came into court on 27 February, I took the view that it would not be appropriate to give judgment at that time. I therefore adjourned the case and gave directions for the hearing of the case on 31 March 2015. At the hearing on that date it became clear that this is one of those unusual judicial review cases where it would be necessary to hear live evidence from some of the witnesses with the opportunity to cross-examine them. Accordingly, I directed that three witnesses who had filed evidence on behalf of the defendant should attend court on 30 April. In the event, two of the witnesses, Mr Bertrand Walker and Mr Timur Dellaloglu were able to attend then and gave evidence. However, one witness, Mrs Brewer, was unwell that week and could not attend. She was able to attend court on 15 May and I was able to hear that evidence and also closing submissions on behalf of both parties on that date.

7. Factual background

8. The claimant states that he arrived in the United Kingdom on 19 December 2004. He claimed asylum on 21 December. His application was refused on 1 February 2005 and his appeal was dismissed on 16 May 2005. His appeal rights, as at that time, were exhausted on 15 August 2005. During the course of his appeal he referred to the original of his military identity card from Eritrea. In 2005 he still had it but he says that he does know what happened to it after his arrest in 2008 as it was among the things that he packed away at that time and left with a person called Dawud (see paragraphs 12 and 13

of the claimant's witness statement in these proceedings).

9. In the meantime the claimant submitted further representations to the Secretary of State which were refused on 10 October 2007. On 20 August 2008 the claimant, who has no other criminal record, was convicted at the Crown Court at Southwark of two offences: wounding with intent and perverting the course of justice. On 7 October 2008 he was given a determinate sentence. He was sentenced to a total of 7 years' imprisonment and deportation was recommended. The claimant had attacked his former girlfriend. He stabbed her and slashed her forearm and face. He then lied to the police in a witness statement creating a false alibi. That was the basis of the conviction for perverting the course of justice.

10. In his sentencing remarks, His Honour Judge Robbins said that these were very serious offences. He said that the claimant had committed a sustained attack, which was a vicious attack, with a knife, stabbing his victim in the stomach. There were two deep penetrating stab wounds that could easily have killed her if they had penetrated any of her vital organs. He also cut her forearm and slashed her face several times. There was multiple permanent scarring to her face. In relation to the second count on the indictment the learned judge said that the claimant had made a lying false witness statement to the police and pursued that false alibi, putting the police on a false trail until, by analysis of his Oyster card and other matters, they were finally able to break the false alibi.

11. The custodial part of the claimant's sentence expired in November 2011. In the normal course of events he would then have been released on licence until the end of his sentence in May 2015. A number of conditions are attached to his licence which it is unnecessary for present purposes to rehearse but they should be referred to and I have taken them

carefully into account.

12. On 4 November the terms of his release on licence were set. However, from 6 November 2011 he was detained by the Secretary of State under immigration powers. On 12 January 2012 notification was served on him of his liability to automatic deportation. Further representations were made on his behalf but dismissed and a deportation order was made on 20 July 2012. The claimant appealed against that deportation order. That appeal was dismissed on 4 December 2012. The claimant was found to be incredible. Permission to appeal was refused by the First-tier Tribunal on 7 January 2013 and by the Upper Tribunal on 31 January 2013.

13. Further representations were made on the claimant's behalf on 10 July and 20 September 2013 seeking revocation of the deportation order. On 11 December 2013 that application was refused. An appeal against that refusal was recently allowed by the First-tier Tribunal on article 3 grounds in a decision promulgated on 24 April 2015. It is not yet clear what, if any, further steps will be taken in relation to those proceedings. On 14 November 2013 a pre-action protocol letter was served challenging the claimant's detention. On 27 November 2013 his application for temporary permission was refused.

14. Material legislation

15. It is common ground before me that the provisions in relevant legislation which govern automatic deportation of certain convicted offenders apply to this case. This can be seen from a combination of the relevant provisions in the Immigration Act 1971 ("the 1971 Act") read with the relevant provisions of the Borders Act 2007 ("the 2007 Act").

Schedule 3 to the 1971 Act, so far as material, provides in paragraph 2:

i. "(1) Where a recommendation for deportation made by a court is in force in respect of any person, and that person is not detained in pursuance of the sentence or order of any court, he shall, unless the court by which the recommendation is made otherwise directs... be

detained pending the making of a deportation order in pursuance of the recommendation, unless the Secretary of State directs him to be released pending further consideration of his case or he is released on bail...

ii. (2) Where notice has been given to a person in accordance with regulations under section 105 of the Nationality, Immigration and Asylum Act 2002... of a decision to make a deportation order against him, and he is not detained in pursuance of the sentence or order of a court, he may be detained under the authority of the Secretary of State pending the making of the deportation order.

iii. (3) Where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom (and if already detained by virtue of sub-paragraph (1) or (2) above when the order is made, shall continue to be detained unless he is released on bail or the Secretary of State directs otherwise)..."

16. Section 32 of the 2007 Act so far as material provides:

i. "(1) In this section 'foreign criminal' means a person-

(b) who is not a British citizen

(c) who is convicted in the United Kingdom of an offence, and

(d) to whom Condition 1 or 2 applies.

i. (2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months...

ii. (4) For the purpose of section 3(5)(a) of the Immigration Act 1971 (c. 77), the deportation of a foreign criminal is conducive to the public good.

iii. (5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33)..."

17. Section 36 of the same Act, so far as material, provides:

i. "(1) A person who has served a period of imprisonment may be detained under the authority of the Secretary of State—

(a) while the Secretary of State considers whether section 32(5) applies, and

(b) where the Secretary of State thinks that section 32(5) applies, pending the making of the deportation order.

ii. (2) Where a deportation order is made in accordance with section 32(5) the Secretary of State shall exercise the power of detention under paragraph 2(3) of Schedule 3 to the Immigration Act 1971 (c. 77) (detention pending removal) unless in the circumstances the Secretary of State thinks it inappropriate..."

18. Relevant legal principles

19. The following principles appear to be common ground. The burden of showing that detention was and continued to remain lawful lies upon the defendant (see R v Secretary of State for the Home Department ex parte Khawaja [1984] AC 74 110). When reviewing the legality of executive detention the court may find that the exercise of authority to detain is vitiated by any public law error that bears upon and is material to the decision to detain (see R(Lumba) v Secretary of State for the Home Department [2012] AC 245 at paragraph 62-68 in the judgment of Lord Dyson JSC. (See also the judgments of the other members of the court in Lumba at paragraphs 170, 175, 193, 207 and 238).

20. I sought to summarise the applicable principles in R(HA) (Nigeria) v Secretary of State for the Home Department [2012] Medical Law Reports 353 at paragraphs 134-143, in particular paragraph 143 where I stated:

i. "I derive the following principles from those passages [in Lumba]:

(1) The tort of false imprisonment requires proof that the Claimant was detained directly and intentionally.

(2) The Defendant must then be able to show that there was lawful authority for that detention.

(3) If the Defendant had the power to detain but exercised that power in a way which is vitiated by an error of public law, the apparent authority will fall away and the Defendant will not in truth have the lawful authority she needs in order to justify the detention.

(4) Not all public law errors will vitiate the authority to detain, only those which bear upon and are relevant to the decision to detain.

(5) Since the tort is actionable per se and does not require proof of damage, the Defendant will have committed that tort even if, had she not made the relevant error of law, she could and would have detained the Claimant. There is no requirement for 'causation' in that sense.

(6) However, the question of whether the Claimant would have been detained in any event will be relevant to quantum of compensatory damages."

21. One of the relevant public law principles is set out in the well known decision of this court in R v Governor of Durham Prison ex parte Hardial Singh [1984] 1 WLR 704 which has been subsequently approved by the appellate courts including the Supreme Court in Lumba. In the present case the claimant relies upon the second, third, and fourth principles in that case, as follows. The second principle is that the deportee may only be detained for a period that is reasonable in all the circumstances. The third principle is that if before the expiry of the reasonable period it is apparent that the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to exercise the power of detention. The fourth principle is that the Secretary of State should act with reasonable diligence and expedition to effect removal.

22. It is helpful in this context to remind oneself of what Lord Dyson said in his judgment in Lumba at paragraphs 103-104. At paragraph 103 he stated:

i. "A convenient starting point is to determine whether, and if so when, there is a realistic prospect that deportation will take place. As I said at para 47 of my judgment in I's case, there may be situations where, although a reasonable period has not yet expired, it becomes clear that the Secretary of State will not be able to deport the detained person within a period that is reasonable in all the circumstances, having regard in particular to time that the person has already spent in detention. I deal below with the factors which are relevant to a determination of a reasonable period. But if

there is no realistic prospect that deportation will take place within a reasonable time, then continued detention is unlawful."

23. At paragraph 104 Lord Dyson stated:
    i. "How long is a reasonable period? At para 48 of my judgment in I's case I said:

    ii. 'It is not possible or desirable to produce an exhaustive list of all the circumstances that are, or may be, relevant to the question of how long it is reasonable for the Secretary of State to detain a person pending deportation pursuant to paragraph 2(3) of Schedule 3 to the Immigration Act 1971. But in my view, they include at least: the length of the period of detention; the nature of the obstacles which stand in the path of the Secretary of State preventing a deportation; the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles; the conditions in which the detained person is being kept; the effect of detention on him and his family; the risk that if he is released from detention he will abscond; and the danger that, if released, he will commit criminal offences.'"

24. I have also been reminded of, and taken careful account of, what Lord Dyson said in rejecting what he described as the "exclusionary rule" in relation to the relevance of appeals, in particular at paragraphs 120 and 121 of that judgment.

25. The application of the principles to which I have referred to a case where there is a duty to detain rather than a simple power to do so was considered by the Court of Appeal in R(Francis) v Secretary of State for the Home Department [2015] 1 WLR 567 in which the main judgment was given by Moore-Bick LJ. That case concerned a claim for damages for false imprisonment arising from the claimant's detention pending deportation. At paragraph 37 Moore-Bick LJ stated:
    i. "The *Hardial Singh* principles reflect two important propositions relating to the exercise of an administrative power of detention. The first is that the power is to be exercised only for the purposes for which it was granted; the second, that it can be exercised only for a reasonable period..."

26. At paragraph 38 he stated:

    i. "It was common ground, therefore, that the *Hardial Singh* principles apply in a case where the Secretary of State exercises her discretionary power to detain under paragraphs 2(2) and 2(3) of Schedule 3 [to the 1971 Act], but the question that arises on this appeal is whether they also apply when a person is detained under paragraphs 2(1) and 2(3)..."

27. As will be seen, Moore-Bick LJ answered that question in the affirmative. At paragraph 45, he stated:

    i. "The origin of the *Hardial Singh* principles lies in the presumption that even if Parliament has conferred a power of detention on the Secretary of State in general terms, it did not intend that power to be unrestricted. In my view this is a highly desirable approach to take to legislation of this kind in the defence of personal liberty. I think it is possible in this context similarly to view the *Hardial Singh* principles as an expression of Parliament's presumed intention to restrict the scope of the requirement for detention imposed by paragraph 2(1). In my view that is a surer way in which to confine the operation of that paragraph within reasonable limits and gives a remedy to a person who is detained otherwise than in accordance with those restrictions."

28. At paragraph 47 he stated:

    i. "I have no doubt that the *Hardial Singh* principles apply to detention under paragraph 2(1) of Schedule 3 [to the 1971 Act]. The purpose of detention under that paragraph is to facilitate deportation and in the absence of any indication to the contrary Parliament must be taken to have intended that persons should be detained only for that purpose. Once the purpose of detention has become incapable of being achieved, detention can no longer be justified and it cannot have been Parliament's intention that it should then continue. In my view Parliament must also have expected the Secretary of State to act with reasonable diligence and expedition to remove the detainee and must, in the absence of any contrary indication, be taken to have intended that detention should continue only for a reasonable period. Insofar as paragraph 2(1) (and, on the making of a deportation order, paragraph 2(3)) contains a statutory obligation to detain, the *Hardial Singh* principles can be understood as implied limitations on the scope of an otherwise unqualified direction."

29. See also the concurring judgment of Christopher Clarke LJ at paragraph 53 and that of Sir Stephen Sedley at paragraphs 66-68.

30. I was reminded by counsel for the Secretary of State in the present case of the decision of the Court of Appeal in R(Muqtaar) v Secretary of State for the Home Department [2013] 1 WLR 649, in particular, the judgment of Richards LJ when he considered the third principle in Hardial Singh. Having set out the principles at paragraph 33 of his judgment Richards LJ stated at paragraph 36:

    i. "I see no reason for differing from the conclusion reached by the deputy judge on this issue. At the time of receipt of the rule 39 indication there was a realistic prospect that the ECtHR proceedings concerning removal to Somalia would be resolved within a reasonable period: it was possible but was not apparent that they would drag on as in practice they did. Nor was it apparent that the ECtHR's final decision would be such as to prevent the appellant's removal. I stress 'apparent', because that is the word used in the approved formulation of *Hardial Singh* principle (iii) and in my view it is important not to water it down so as to cover situations where the prospect of removal within a reasonable period is merely uncertain."

31. I was also reminded by counsel for the Secretary of State of the decision of Beatson J in R(MMH) v Secretary of State for the Home Department [2007] EWHC 2134 (Admin) at paragraph 37 where it was stated that:

    i. "It does not appear that the requirement of a realistic prospect is a high hurdle."

32. Finally in this context counsel for the Secretary of State drew my attention to the decision of Sales J in R(MH) v Secretary for the Home Department [2009] EWHC 2506 (Admin), in particular, at paragraphs 79 and 102. At paragraph 102 Sales J stated:

    i. "... the lawfulness of an individual's detention for the purposes of removal depends upon an overall assessment from time to time of a range of factors as is emphasised in all the authorities, each case depends upon its own particular facts."

33. At paragraph 79 Sales J stated:

i. "In addressing the question on ground (1),[that concerned the suggestion that there was never any realistic prospect of removal of the claimant] the court has to ask whether there was 'some prospect' of the claimant being removed within a reasonable period: see *R(Khadir) v Secretary of State for the Home Department* [2006] 1 AC 207, [32]-[33] per Lord Brown of Eaton-under-Heywood... It is for the court to assess whether the period in contemplation was a reasonable one in all the circumstances. The court is not confined to applying Wednesbury principles to assess whether the Secretary of State himself rationally held the view that the period in contemplation was reasonable. But at the same time, in a case such as this, where a judgment about the availability of removal depended in a significant way upon an assessment of how a foreign government would react, the court will be slow to second-guess the assessment in that regard which is made by the executive. This reflects the fact that the executive is much better placed than the court to assess the likely reactions of foreign governments, both because its representatives are directly involved in the relevant negotiations with those governments and because they are themselves, or have access to assessments by, skilled diplomats and officials with knowledge and experience of foreign affairs."

34. In relation to the fourth principle in Hardial Singh I was reminded by both parties of the decision of the Court of Appeal in R(JS Sudan) v Secretary of State for the Home Department [2013] EWCA Civ 1378 in which the main judgment was given by McFarlane LJ with whom the Master of the Rolls and Sharp LJ agreed. At paragraph 55 McFarlane LJ quoted from R(Krasniqi) v Secretary of State for the Home Department [2011] EWCA Civ 1549 at paragraph 12 in the judgment of Carnwath LJ.

i. "'... There is a dividing-line between mere administrative failing and unreasonableness amounting to illegality. Even if that line has been crossed, it is necessary for the claimant to show a specific period during which, but for the failure, he would no longer have been detained...'"

35. On the facts of the case in JS(Sudan) the court found that there were three periods where the dividing line had been crossed. Those were three periods referred to at paragraph 60

of the judgment when there was little or no administrative activity taking place and measured in turn 3 months, 5 months and 4 and a half months, a total of over 12 months, during a total period of 15 months' detention.

36. The court observed that on the face of the papers this administrative delay was unaccounted for and it was to be expected that the Secretary of State would have filed a witness statement explaining in sufficient detail what had occurred, but no such statement was filed. McFarlane LJ went on to state in paragraph 60:
    i. "... These cases are very fact specific but, where, as here, a significant proportion of the total period of detention is marked by an apparent absence of any administrative activity, and no explanation for that state of affairs is proffered, then a court, standing back and looking at all of the circumstances, is entitled to come to the view that a proportion of the total period of detention was unreasonable and therefore unlawful."

37. On the facts of the case he concluded at paragraph 66 of his judgment that at least two thirds of the 12 month period, in other words 8 months, could only been seen as falling on the unreasonable side of the line. He went on to hold therefore that 8 months of the total period of 15 months in detention was unreasonable and therefore unlawful.

38. Finally in the citation of authorities for present purposes, I was reminded by counsel for the Secretary of State of the decision of the Court of Appeal in SS(Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 550 in which the main judgment was given by Laws LJ. Counsel for the Secretary of State emphasised the public policy objective underlying deportation to which the automatic deportation provisions in the 2007 Act apply. At paragraph 52 Laws LJ stated:
    i. "In my opinion, however, this is a central element in the adjudication of Article 8 cases where it is proposed to deport a foreign criminal pursuant to s.32 of the 2007 Act. The width of the primary legislator's discretionary area of judgment is in general vouchsafed by high authority... But it is lent added force where, as here, the subject-matter of the legislature's policy lies in the field

> of moral and political judgment, as to which the first and natural arbiter of the extent to which it represents a 'pressing social need' is what I have called the elected arm of government: and especially the primary legislature, whose Acts are the primary democratic voice. What, then, should we make of the weight which the democratic voice has accorded to the policy of deporting foreign criminals?"

39. In my view there is limited, if any, assistance to be derived from the case of SS in the present context. As will be apparent from the passage which I have cited, the court was there concerned with article 8 cases. Article 8, like similar Convention rights to be found in Schedule 1 to the Human Rights Act 1998, requires a balance to be struck; in particular it requires the principle of proportionality to be respected. It is well established that depending upon the context, there can be to a wider or narrower extent a discretionary area of judgment afforded to the executive or, in that case, the legislature when it comes to the weight to be given to the underlying public policy aims which the state seeks to achieve. In my view, the present context is governed by the well known principles in Hardial Singh as approved in decisions such as Lumba and applied in this context by the Court of Appeal in Francis.
40. My findings of fact on the documentary and the oral evidence
41. The claimant was detained pursuant to the Immigration Act on 6 November 2011. Thereafter, monthly detention reviews took place in accordance with normal practice. On 20 July 2012 the deportation order was in this case. On 23 July 2012 the Country Returns Operations and Strategy team (CROS) at the Home Office advised that they were unable to obtain Emergency Travel Documents (ETDs) for Eritrean nationals without supporting documentation. On 10 August 2012 there was a detention review. In this it was said:
    i. "I will attempt to request supporting evidence... in order to submit an ETD application."

42. On 3 September 2012 a bail application was completed on the claimant's behalf by BID, that is Bail for Immigration Detainees. In this the claimant stated that his ID card was: "in my property with a friend but I have no contact with him."

43. On 28 November 2012 there was a detention review in which the case worker said in section 5 in answer to the question: What was the action plan for the next review period? (each review period being the coming month):

    i. " • I will continue to monitor the outstanding appeal and if it proves unsuccessful arrange for Mr Abraha to be re-interviewed in regard to the ETD and if he still fails to cooperate I will instruct the IO to issue a section 35 warning.

        • As CROS have advised that they are currently unable to obtain ETDs for Eritrean nationals unless they provide supporting evidence a CMT referral for release will then be considered."

44. On 4 December 2012 the claimant's deportation appeal was dismissed. December 2012 was the last time when there was an attempt made by the defendant to make an application for a travel document from the Eritrean authorities (see a letter from the Treasury Solicitor dated 20 March 2015 and the evidence in this court of Mrs Brewer). There is in evidence before the court an undated file note which appears to date from early 2013. This states:

    i. "Bit of a dead end case - subject has been detained since November 2011. He is DO served and appeal rights exhausted. The only outstanding barrier is a valid travel document. Many attempts have been made to document him. However, the Eritrean Embassy refuses to issue ETDs unless original supporting evidence is provided, which the subject has failed to do. May have to consider releasing the subject provided a suitable release address is provided."

45. When cross-examined before this court, Mr Walker, who was the case worker in this case from October 2013, was unable to assist who had written that file note. Perhaps this is

unsurprising because it dates from a time before he became the relevant case worker.

46. On 25 January 2013, a detention review reiterated that it was the intention to draft a referral for release upon receipt of a sufficient address. On 19 February 2013 in a detention review it was said:
    i. "Should Mr Abraha's release be approved by the offender manager, I will draft a CMT referral for release. At this juncture no address has been provided."

47. On 20 March 2013 the defendant obtained a copy of the claimant's military ID card. There is a case record sheet, known as a GCID record sheet, which records this. It is also said that attempts would be made to obtain the original from the prison:
    i. "Once obtained, another ETD application should be submitted to the Eritrean Embassy."

48. In fact, that original has never been obtained.

49. On 17 May 2013 in the detention review it was stated:
    i. "Unless we can get hold of Mr Abraha's identity card fairly soon in order to submit a new ETD application the likelihood of him being removed fairly soon is highly unlikely."

50. On 10 July 2013 in a detention review it was stated:
    i. "We need to obtain Mr Abraha's identity card quickly in order to submit a new ETD application. The longer the delay in obtaining the document the more unlikely his removal becomes."

51. On 7 August 2013 in a detention review it was stated:
    i. "We need to obtain Mr Abraha's identity card quickly in order to submit a new ETD application. The longer the delay in obtaining the document the more unlikely his removal becomes."

52. Later, in the same document, in the section headed "Authorising officer's comments including response to the recommendation" it was stated:
    i. "We must try all avenues for progression of the ETD to make removal a realistic prospect within a reasonable period during this review period."

53. That was a reference to the month following, as I have said, the normal review period.

54. On 5 September 2013 it was again stated that:
    i. "We need to obtain Mr Abraha's identity card quickly in order to submit a new ETD application."

55. On 30 September 2013 an email was sent by CROS stating that:
    i. "Copies cannot be used to apply for an Eritrean ETD and they only accept original documents."

56. On 1 November 2013 there is an internal email from AD which, as I understand it, stands for Assistant Director:
    i. "Has anyone had the conversation with CROS re speaking to the Eris on this case? Also, when we have had the ID card since March, why has it taken until October to send it for authenticity?"

57. That was a reference to the fact that, it not having been possible to obtain the original of the military ID card, attempts were made via the Foreign and Commonwealth Office to verify the authenticity of a copy of that ID card.

58. On behalf of the claimant a pre-action protocol letter was sent on 14 November 2013 and a response was made on 27 November. On 28 November 2013 in the detention review, the authorising officer said:
    i. "We need to nail down what is going on with the ID card. Please can I receive a progress report by the end of Monday 2 December? We need to know when we can expect a reply from FCO and when expect to have sufficient information to put to the Eritrean Government."

59. Earlier, on 1 November 2013, there was an email from the Assistant Director of Operations, Criminal Casework Immigration Enforcement at the Home Office, which stated:
    i. "Some pro-active action in the ETD progression needs to happen within the next review period. I have copied colleagues in to help make this happen. I asked that we look into where we obtained a

copy of the ID card some months back and have still not received a satisfactory answer. In addition, has anyone had the conversation with CROS etc..."

60. On 4 November 2013 there was an email, which appears to be a reply, from an investigations officer in Immigration Enforcement:

    i. "The copy was taken from the original genuine card during an appeal against his asylum claim. However, as the Eritreans won't accept a copy as supporting evidence this copy sent with a translation to the FCO via... CST. All the data on the ID card appears to be genuine. It's just a question now of further checks being completed by the FCO.

    ii. I attempted to get the original ID card but I am still waiting for the arresting station from his last arrest to get back to me with a copy of his custody record just in case they seized it..."

61. So far as I can see, from the evidence before this court, no specific action in fact was then taken from November 2013 until May 2014. On 12 May 2014 there is an email stating:

    i. "I am currently undertaking a detention review which is due for 16 May 2014. Please be advised that this DR will need to be authorised by our Deputy Director. Therefore I am kindly asking if we have received any response from the FCO as to whether the military ID card is genuine or not."

62. On 20 May 2014 there was an email from the investigations team at Criminal Casework Immigration Enforcement asking: "Is there any update from the FCO yet?" On 26 June 2014 there was an email sent from the Country Specialist team at Immigration Enforcement, it would appear, to the Embassy in Eritrea, asking about the genuineness of the copy of the ID card. The next day, 27 June, there was a reply by the British Embassy in Eritrea: "We believe that the document is genuine." This was said to be after discrete enquiries of a friend who worked in the local administration without disclosing why.

63. In another email of 27 June 2014 the Country Specialist team reported that after numerous phone calls, emails et cetera, to a variety of people, that a response had been

received from the Embassy:

i. "It doesn't categorically state that the document is genuine but the consensus is that the National Service identity card is genuine. That may help in progressing the case although officials at the Eritrean Embassy have stipulated that they require original supporting documentation before considering issuing an ETD."

64. It would appear that although a request had been sent to the FCO in October 2013, no steps had been taken to obtain the verification sought until June 2014. When such steps were taken the British Embassy in Eritrea responded within 24 hours. It is common ground before me that the defendant cannot rely on any delay by the FCO to excuse herself. This is because as a matter of constitutional law there is one Secretary of State, although in practice, as is well known, different ministers head different departments.

65. On 11 July 2014 in a detention review, this information was recorded:

i. "However, the Eritrean Embassy has stipulated that they require original supporting documentation before considering issuing an ETD to Mr Abraha."

66. Furthermore it was stated:

i. "Subject to his appeal for refusal to revoke DO it is considered that removal can be achieved within a reasonable timescale."

67. As I have mentioned, the claimant was released on 6 August 2014. The events of August 2014 are explained in the witness statement filed in these proceedings by David Wood, dated 3 March 2015. He explains at paragraph 1 that he is the Director of Crime and Intelligence at the Immigration Enforcement section of the Home Office.

68. At paragraph 6 he states:

i. "...On 1 August 2014 before my decision to release the claimant his case had been referred to me on a release referral. On that occasion I declined to direct a release..."

69. Later in paragraph 6 he continues:

i. "... Whilst I appreciated that the case did not fall within a regular

> ETD application process but would need to be presented to the Eritrean authorities as a special case, there remained a reasonable prospect that documentation could be obtained given the willingness of the FCO to assist with this process and the fact that this was the type of case where assistance at minister level could be engaged, both in the Home Office and other areas of Government. The importance that Parliament and the courts have ascribed to deportation is a matter of significance in justifying priority treatment with the associated resource costs."

70. He explains at paragraph 7 that after he refused release the case remained one that was being monitored at a high level as it had been before the refusal. After what he describes as "the successful interview on 4 August 2014" he reconsidered the release referral taking account of a range of factors. In particular, he states that it was necessary to have regard to the period of time that the claimant had been detained to date. He was satisfied the limits of the permitted period of detention had not yet been approached but it was necessary to weigh up the benefits of continuing detention at that stage up to the limit if deportation was not achieved in that period, against release with the potential to re-detain if and when a travel document was obtained.

71. At paragraph 8 Mr Wood explains that the decision to release the claimant was not an easy one and the risks involved in release were not taken lightly. At paragraph 9 he informs the court:

    i. "I did anticipate that by releasing at a time that was proximate to the scheduled High Court hearing there may be a temptation to misread the release decision as being one to garner favour with the court or as an acceptance that detention was unlawful. In fact I considered that such a release decision was unlikely to have any favourable influence on the court and I confirm that release was not directed for that reason. As I have confirmed already, I was satisfied that detention remained lawful and would have done for a period into the future so it would be quite wrong to interpret the release decision as a recognition that detention become unlawful..."

72. Of course, what the executive says in legal proceedings, for example, in the form of

Mr Wood's witness statement, cannot bind this court as to whether detention was or was not lawful. However, I am satisfied on the basis of the evidence placed before this court that Mr Wood did genuinely in his own mind take the decision for proper reasons, as he states in his witness statement, and did not do so because of these proceedings.

73. In view of the hearing which was imminent in early August 2014 some witness statements were filed on behalf of the defendant. At that time of course the claimant was still detained.

74. In the first witness statement of Mr Dellaloglu dated 1 August 2014, he describes himself as the Assistant Country Manager, Africa 1 of CROS. He is a Higher Executive Officer. He informed the court that the team within which he works is a specialist team that plays a liaison role, sometimes in conjunction with the FCO, to facilitate the provision of travel documentation through effective diplomatic engagement. He has worked on the Eritrea team since January 2013. At paragraph 3 of his witness statement, Mr Dellaloglu said:

    i. "In relation to the general position on documentation of Eritrean nationals for return to Eritrea I can confirm that there is positive engagement with the Eritrean authorities on the issue of... ETDs. The Eritrean authorities will only consider ETD applications supported by original Eritrean identification. There are no consistent timescales for an ETD to be issued and given the low volume of applications, it is not helpful to consider average times. I can confirm that the last ETD application issued by the Eritrean authorities took 3 months to process but an application may take longer."

75. At paragraph 4 Mr Dellaloglu stated:

    i. "In common with the re-documentation position for many counties, voluntary returns' re-documentation will be achieved more easily. In the context of Eritrea this is so in part because the formal position is that the Eritrean authorities require original identity documentation. For voluntary removals this should not be a difficulty since all Eritreans are issued with national identity cards at age 18 [the original witness statement said 16 but this was corrected in oral evidence by Mr Dellaloglu on 30 April 2015] which they are required to carry. In addition, those who travel

> will usually have passports. Further, military service is compulsory and a military ID card will be issued that the individual is required to carry. Given these requirements, Eritrean nationals can be expected to keep their ID safe and accessible".

76. From that witness statement taken at face value it is reasonable, in my view, to draw the following inferences:

    (1) There was positive engagement at the material date with the Eritrean authorities on the issue of Emergency Travel Documentation;

    (2) The Eritrean authorities would only consider ETD applications which were supported by original Eritrean identification;

    (3) An example of such documentation which would suffice is a military ID card.

77. I can see no reason why the witness should have drawn the court's attention specifically to the fact that military service is compulsory and a military ID card must be carried by an individual to whom it is issued unless it was to give that impression. It is also consistent, in my view, with the entire thrust of the contemporaneous documentary records. They clearly demonstrate, in my view, that the search was initially for an original of the claimant's military ID card and subsequently to confirm whether the copy was authentic. Otherwise, the months of effort which were put into those exercises would have been futile. Nowhere in his first witness statement did Mr Dellaloglu inform this court that more than one document was required by the Eritrean authorities. Furthermore, nowhere in his witness statement did he inform the court that a military ID card is not one of those relevant documents. This means that even if the original of the military ID card in the claimant's case had been located, it would not have been accepted by the Eritrean authorities in pursuit of an application for an ETD. Furthermore, the witness statement of Mr Dellaloglu gave the impression to this court that, in principle, the

Eritrean authorities were willing to support enforced removals to Eritrea provided original Eritrean documentation could be provided, and such a document would be exemplified by a military ID card. Hence his use of the phrase "positive engagement" with the Eritrean authorities.

78. At the hearing before me on 30 April 2015, when Mr Dellaloglu was cross-examined, he apologised to this court for these omissions. It is fair to draw attention at this juncture to a document which has become known at this hearing as the Horizon document which is headed "Eritrea - Documents for Removal. Document required for removal". It is then said in a bullet point: Emergency Travel Document (ETD). The document states:
    i. "The Eritrean Embassy currently only processes ETD applications accompanied by original supporting evidence."

79. Under a heading "Correspondence Address for the Embassy of the State of Eritrea" the document states:
    i. "At present ETD applications cannot be sent directly to the Embassy. If case owners feel they have a suitable case (with supporting evidence such as a passport, birth certificate, *OR* ID card) that has been approved by their DLO please contact CROS April 1 team from the Country Returns Operations and Strategy Unit (CROS). The team will consider whether the application can then be presented to the Embassy." [Emphasis added]

80. Further on the same page the document states:
    i. "You must submit all the documents listed below in order for the Embassy to consider an ETD application (after seeking approval from CROS):

        - Submission letter to accompany ETD applications or further supporting evidence letter
        - Biodata form
        - Laissez-Passer form to be completed in English and Tigrinya

- Travel document form
- 3 passport photos cut to size
- Supporting evidence to include original of expired passport, original of birth certificate, original of ID card. All supporting evidence accompanying an ETD application must be translated into English. You must arrange for these documents to be translated by an interpreter if necessary before submitting them to the Embassy
- Full UK birth certificate must be provided for children born in the UK

ii. The above listed documents are the only documents accepted by the Embassy. No other documents should be submitted to the Embassy. You must ensure that no internal UK Border Agency forms are submitted to the Embassy..."

81. The Horizon document was not exhibited to Mr Dellaloglu's witness statement of 1 August 2014. It is fair to say that it was one of the documents to be found in the bundles in this case. However, it is also fair to observe that there is a vast amount of documentation in this case, extending at the last count to around 1,000 pages. In my view, the full significance of the Horizon document was not drawn to this court's attention either in any witness statement or in submissions made at the original hearing in February.

82. On its face the Horizon document might be thought to be ambiguous. It contains on its face an apparent inconsistency within the document itself. The first passage which I have cited might give the impression that the supporting evidence referred to "a passport, birth certificate or ID card" is expressed in the alternative and any of those documents will suffice.

83. The second passage, in particular the penultimate bullet point, appears, on the other hand,

to suggest that all of the supporting evidence, and in particular each of three documents, need to be supplied. That is an expired passport, a birth certificate and an ID card, all in the original.

84. However, there is one other aspect which deserves to be noted before leaving the Horizon document. On its face it would be ambiguous as to whether it embraces, when it refers to an ID card, a military ID card. Again, these points, in my view, were not sufficiently drawn to the court's attention, nor explained.

85. I will now refer to the witness statement filed by Mrs Brewer in the Zeregegis case. This was dated 26 February 2015, as I have noted, the day after the original hearing in the present case had concluded. Mrs Brewer explains at paragraph 1 that she is a Senior Executive Officer and works at Africa 1 in CROS. She is the Country Manager of Africa 1. In paragraph 3 of that witness statement she stated:

    i. "There is no formal document from the Eritrean authorities that sets out the requirements for an application for Emergency Travel Documents (ETDs). However, over a series of meetings the requirements at any one time have been established and they are set out in the internal CROS advice that is available on the information system accessible by Home Office case workers. I can confirm through personal experience as Country Manager for Eritrea that the current situation with regards to obtaining an Emergency Travel Document from the Eritrean authorities is that the following supporting original documentary evidence must be provided: original expired passport, original birth certificate, *and* original ID card." [Emphasis added]

86. At paragraph 7 of that witness statement Mrs Brewer stated:

    i. "Between 2008 and 2011 the Eritrean Government had documented a number of individuals that they had not utilised either for internal administrative reasons or due to court injunctions... This meant that the Eritrean Government had been put to the trouble of preparing ETDs with the associated verification processes in Eritrea without the ETDs being used. Consequently there was an expression of discontent by the Eritrean Government at a political level through the Eritrean Special Adviser to the President indicating in 2012 that Eritrea would not

> continue to support the ETD process. In fact there was no change to the standing arrangements between CROS and the Eritrean Embassy so there would have been no bar to presenting an ETD application to the Eritrean Embassy, though, as it happened, there were no applications at the presentation stage at that time. The volume of applications for ETDs received by CROS is very low. The concerns of the Eritrean Government were addressed at a political/diplomatic level in the dialogue on migration related issues between the two countries that has been positive and constructive in relation to improving the existing process..."

87. In the same paragraph Mrs Brewer refers to a meeting held on 27 November 2014 between the then Immigration and Security Minister in this country and the Eritrean Foreign Minister in Rome. At paragraph 8 Mrs Brewer stated that following that meeting there was a joint Home Office/FCO official delegation which visited Asmara in Eritrea between 9-11 December 2014.

88. This was the witness statement which prompted counsel for the Secretary of State, as I have mentioned, to file a note with this court as a matter of urgency on 26 February 2015. In that note counsel stated that she would like to draw the court's attention to a very recent statement from CROS concerning the position with Eritrea. This covers matters that the court or the claimant might consider to be relevant, "albeit that the defendant does not consider that it materially alters the issues in this case."

89. Paragraph 2 of counsel's note stated:

    i. "In particular the political dialogue with the Eritrean Government was not in counsel's knowledge at the time of the hearing as it did not alter the CROS arrangements for ETDs. However, it may be the claimant would wish to argue that it may have been considered in 2012 that there was a danger that the discontent expressed at a political level about the non utilisation of ETDs issued under the regular ETD process could have led to an actual refusal of an ETD application (albeit that this was not what happened in the event). From the standpoint of this particular case it was always a special case outside of the regular ETD process so it may be that whether or not the regular ETD process would be supported as it stood, it is not directly relevant..."

90. I should note that so far as I am aware, those phrases "regular ETD process" and "a special case" were the first time that these concepts were used in the context of the present case. So far as I can discern, there is no reference in the contemporaneous documentary evidence to those concepts whether or not those particular phrases were used.

91. I had the opportunity to hear the live evidence of Mrs Brewer on 15 May 2015 when she was cross-examined in the present case. I will turn to that now. Mrs Brewer filed her witness statement in the present case on 6 March 2015. To some extent it replicates what she had said in the witness statement in the Zeregegis case. At paragraph 2 she explains that she makes the statement in response to the direction of the court to explain how there came to be a statement from herself in Zeregegis in which she provided a greater degree of information than that provided by her colleague who gave a statement in the present case. That, of course, was Mr Dellaloglu.

92. At paragraph 4 Mrs Brewer states that:

    i. "From personal experience, relations with the Eritrean Embassy are positive, cordial and conducted in a correct and formal way."

93. At paragraph 5 she draws a distinction between FCO work on a political and diplomatic level which is distinct from what she calls "the operational aspects of obtaining ETDs." She explains that the FCO's political and diplomatic work concerns the more general relationship between a foreign state and the UK.

94. Paragraph 8 of her witness statement is similar to the contents of paragraph 3 of her witness statement in Zeregegis which I have already cited. At paragraph 13 Mrs Brewer refers to and seeks to explain some documents which had been generated by the FCO. Her view is that they contain certain misapprehensions. In any event, the fundamental

point which she has maintained and continued to maintain in her oral evidence before me was that there is a vital distinction to be drawn between the diplomatic/political level between states and the operational level, in particular the relationship between CROS and the Eritrean Embassy in this country. That is evidence to which I will return at the appropriate juncture.

95. At paragraph 15, turning to the position in the present case, Mrs Brewer explains that although she was asked to provide a witness statement in this case she could not do so because she was on honeymoon at the time. At paragraph 16 she explains to the court that it was always a clear that a military identity document was not one of the documents that was in the "standard" application list for the purposes of the Eritrean authorities. It follows, she states, that it could never have been the position that this was considered to be a "regular" ETD application case. Also in paragraph 16 of her witness statement Mrs Brewer explains that there have been from time to time other states, not Eritrea, that insist on "consent" being given as a pre-requisite to the issue of an ETD. She informs the court that it is not right to say that this has even been the official or de facto position in the case of Eritrea.

96. At paragraph 19 of her witness statement Mrs Brewer states that she believes that the evidence in the two cases presented to the court was not inconsistent but rather the witness statement in the present case was focused more narrowly on the issue that was asked to be considered, being the Eritrean ETD application process, than the approach which she took in her statement in the Zeregegis case.

97. In his second witness statement dated 6 March 2015, Mr Dellaloglu explains that he wishes to clarify the steps taken which led to:

    i. "a difference in approach to providing my witness statement in the case of Abraha to that of my colleague Ann[?] Brewer in the case

of Zeregegis. Furthermore, I will provide a detailed explanation of my involvement in the case of Abraha and the events which led to my witness statement on 1 August 2014" (see paragraph 2).

98. At paragraph 4 Mr Dellaloglu states that on 30 July 2014 in the absence of his line manager, Mrs Brewer, he was asked by the litigation team in the Home Office to provide a witness statement in this case setting out the documentation process of Eritrean nationals for return to Eritrea. He states:

i. "I consulted the information available and drafted a witness statement presenting what I understood to be the material information in relation to the current ETD process for Eritrea. I understand that some time after I provided evidence a witness statement was requested in the case of Zeregegis which my colleague Ann Brewer provided. As she has explained, she provided a greater degree of information as she took a wider focus noting the wider political and diplomatic matters which were within her knowledge and experience. I note that there is no question of any inconsistency between the statement, rather they reflect the different focus of each witness according to their respective experience and their understanding of what was relevant for the different cases."

99. I turn to the evidence which this court has read and heard from Mr Walker. His first witness statement is dated 20 January 2015. At paragraph 2 he told the court:

i. "I was the case worker during the relevant period whilst the claimant was in detention but once he was released his case was transferred to the non-detained team."

100. In fact, as he told the court in cross-examination, Mr Walker was not the case worker during the entirety of the period of the claimant's detention. It became apparent to the court that he became the case worker in early October 2013. However he was the case worker for almost a year from that time until the claimant's release in August 2014. Mr Walker also explained that there were passages in the detention reviews which follow what he called a "template" and are repeated from time to time unless something different has occurred in the intervening review period.

101. At paragraph 15 of his witness statement, after relating the events up to 31 January 2013 when the claimant's second round of appeal rights became exhausted, Mr Walker stated:

i. "At this stage there were no further legal barriers to removal. The only matter required to effect deportation in accordance with the recommendation of the court was to obtain an ETD since the claimant had not produced any travel documents. To obtain an ETD from Eritrea there was a requirement to produce an original identity document..."

102. Before continuing with the quotation, it appears to me to be a reasonable inference from that passage that only one original identity document was required in order to obtain an ETD from Eritrea. I continue the quotation:

i. "... The claimant has used a false passport but in support of his asylum claim he did provide an original military identification document. The Home Office had retained a copy of that document on file so efforts were made to obtain the original identity card. The claimant stated that he had given the ID card in 2005 to the Home Office but a number of searches to verify that assertion revealed nothing. Given the deception used by the claimant in the past and the fact that use of a false identity is common for foreign nationals entering the UK illegally, verification of the identity details on the copy of the ID card was part of progressing the case once it became clear that the original ID card was unlikely to be forthcoming."

103. From that passage it seems to me to be a reasonable inference that (1) an example of the type of original documentation required by the Eritrean authorities was a military ID card; (2) it was only because an original of that military ID card was unlikely to be forthcoming that attempts were made to verify the authenticity of the copy of the ID card. In my view, nowhere in the evidence was there any explanation given by Mr Walker that (i) more than one original document was required and (ii) that a military ID card was not one of the types of document required.

104. At paragraph 26 of his witness statement Mr Walker stated:

i. "At the time of the decision to detain there was no reason to consider that removal would be impossible within a reasonable period. The legal proceedings meant that removal could not be effected in practice until they were concluded but there was nothing to suggest that the proceedings could not be considered with reasonable expedition by the tribunal. The re-documentation process could be continued whilst the legal proceedings were on foot. Given that the claimant had produced an original military identity card for this appeal, there was a route to establishing whether the identity card he was using was genuine."

105. At paragraph 29 of his witness statement Mr Walker stated that the claimant agreed to an ETD interview on 4 August 2014. During that interview the claimant provided current telephone contact details for relatives including relatives in the UK which were verifiable. The next day the Strategic Director authorised the claimant's release after considering all the circumstances of the case including the period which he had spent in detention.

106. Mr Walker made a second witness statement in this case dated 4 March 2015. At paragraph 3 of that witness statement he stated:

i. "At the time I was progressing this case I understood that an original military ID card was not one of the documents that appeared on the list required by the Eritreans to issue an ETD and that as a result this case would never be submitted to the Eritreans as a regular case."

107. At paragraph 6 he stated that if an original military ID document had been obtained:

i. "This would have provided the main platform for approaching the Eritrean authorities and requesting an ETD although it was always understood that this would be a special case. When it became clear that the original military identity document was unlikely to be obtained without positive cooperation from the claimant, the copy document was then used to verify as far as possible that it was a genuine identity and nationality. With that assurance the FCO and CROS could then approach the Eritrean authorities on a special case basis to seek an ETD. At the same time other lines of enquiry would be followed up so far as possible without the

claimant's cooperation."

108. For my part, having read the contemporaneous documentary evidence which for salient purposes I have cited, I can see no reference during that process, in particular from March 2013, to this either being a "special case" or there being other lines of enquiry to be followed up outside something described as a "regular process". Returning to his second witness statement, at paragraph 7-9 Mr Walker stated that the claimant had been emphatic in taking a non-cooperative stance for the major part of the period in question. He was said to be "rude and aggressive". However, Mr Walker stated there was a change of stance and the claimant was like a different man (see paragraph 8). This was said to be at the interview on 4 August 2014. However, in cross-examination Mr Walker accepted that the only time that he ever arranged an interview with this claimant was that one in August 2014. Mr Walker also accepted in cross-examination that paragraph 15 of his first witness statement did not present an accurate picture. This is because it did not say that more than one document was needed for the purposes of an application for an ETD to the Eritrean authorities. When cross-examined about his second witness statement, in particular paragraph 6, Mr Walker could not explain what he meant by the distinction drawn between a "regular" case and a "special" case. He said that this was for his colleagues to answer. He said he could not remember how many cases concerning Eritrea he had dealt with. He had no knowledge of any regular case in his team, nor did he have any knowledge of any special cases. He did not know how many applications had been made in the past two or three years to the Eritrean authorities. He did not know how many travel documents had been issued by them in that period. He had no idea if they were being issued and said that that question would have to be put to somebody from CROS. I have, of course, heard from representatives of CROS:

Mr Dellaloglu and his line manager, Mrs Brewer.

109. Mr Walker said in cross-examination that he was not aware that the Eritrean authorities were not cooperating with enforced returns. He said that that too would be dealt with by a witness from CROS, as indeed it was, in particular by Mrs Brewer.

110. Application of the relevant principles to the facts

111. The first issue and third issue

112. In my view, on the fact of the present case the first issue, which raises the second principle in Hardial Singh, is closely related to the third issue, which raises the fourth principle in that case. I refer to the chronology which I have already set out. This was a serious case of offending. Not only was the case one to which the automatic deportation provisions of the 2007 Act apply, but the Crown Court had made a recommendation for the deportation of this claimant. It is also important to remind oneself that there was a risk of re-offending and the associated risk of absconding. There is, for example, before the court in evidence the Oasys report of October 2012 which in relation to this offender states that "current offence and history of behaviour suggest a high likelihood of re-offending within a close relationship - not necessarily with the victim - and of serious harm." In the table which appears later in the Oasys report it was said that the claimant posed a high risk to the public and to a known adult if he were to be in the community. Also of relevance is to note that one of the claimant's offences for which he was sentenced involved deception involving the administration of justice. However, that, of course, is not the end of the matter. Other factors have to be weighed in the balance in accordance with the well known principles to which I have already made reference.

113. It is now clear on the evidence that this case was never going to be what has been described as a "regular" one for application for an ETD from the Eritrean authorities.

This is because the three documents required in the Horizon document were not available and a military ID document was not one of those in any event. No action appears to have been taken in the period when the claimant was first detained under immigration legislation from November 2011 to July 2012 although this is not the subject of direct complaint on behalf of the claimant. It is cited as being relevant to the reasonableness of the overall length of detention.

114. At least from July 2012 CROS was advising that an original document was required, yet it took until March 2013 to ascertain that an original of the military ID card was not available. Although during some of that period the claimant was appealing, his appeal was dismissed in December 2012. At some point in early 2013, although the exact date is not known, it was appreciated by the Home Office in the memorandum to which I have referred that this was something of a "dead-end case". It was therefore appreciated that there was a need for expedition yet this did not happen.

115. From March 2013 the tack changed to trying to confirm the authenticity of the military ID card even though it was a copy. Yet it took until June 2014 for that to be done. Even if some of that delay was due to the FCO, that cannot be relied on to excuse the Home Office as was conceded before me by counsel. It is also not clear on the evidence before the court what steps were taken to send a request to the FCO until October 2013. Certainly there was then a long delay until June 2014 before the reply finally came back when the British Embassy was contacted in Eritrea. At long last in fact after that long drawn out process the message was still the same as it had been some two years earlier. An original document would still be required by the Eritrean authorities.

116. Although this was apparently treated as a "special case" by the Home Office,

there was no evidence of any particular discussions or negotiations in this particular case, whether at the level of officials, the level of diplomats, or the level of ministers. I find that this process should not have taken as long as it did. This was not simply administrative delay. In my view a significant part of that delay was unexplained on the evidence and so unreasonable as to be unlawful. I find that some 9 months of the delay falls into that category. Weighing all the relevant factors in the balance, I take the view that a reasonable period for detention in this case would have been 2 years, that is it expired in November 2013. I have come to the conclusion that from 6 November 2013 the claimant's detention became unlawful.

117. The second issue: the third issue in Hardial Singh

118. I do not accept the submission made on behalf of the claimant that even before November 2013 it had become apparent that there was no realistic prospect of removal within a reasonable period. I do not accept the submission that there was no realistic prospect at all of enforced returns to Eritrea at the material time. Reliance was placed on the relatively general statements by certain officials at the FCO and, in particular, the concern expressed by the Special Adviser to the President of Eritrea. However, I accept the evidence of Mrs Brewer that this was at a political and diplomatic level. She said that this did not alter things at the operation level and, in particular, the relationship between CROS and the Eritrean Embassy in the United Kingdom. She contrasted the present context from some others of which she is aware from experience where the state concerned does say that it will simply not accept the return of a national unless a form is signed to show that he or she is returning voluntarily. She was never told of anything of that sort by the Eritrean Embassy in this country. She was never told by that Embassy that no application for an ETD should be made in individual cases at all.

119. Accordingly, in my view, this case, as has been stated so often in this context, must be looked at on its own facts by reference to the principles which I have set out earlier. On that footing, I do not conclude that it was already apparent that there was no realistic prospect of removal of this claimant before November 2013.

120. The duty of candour and cooperation with the court

121. It is well established in this court that judicial review proceedings are unlike ordinary civil proceedings in that they envisage compliance by public authorities with the duty of candour and cooperation with this court. This goes back to as long ago as the decision of the Court of Appeal in R v Lancashire County Council ex parte Huddleston [1986] 2 ALL ER 941, in particular, the judgment of Sir John Donaldson MR. It is well established that this duty is particularly imposed on the central government and is well respected by central government not least because it is an aspect of the rule of law in this country. My attention was drawn by counsel for the claimant to the decision of the Court of Appeal in I v Secretary of State for the Home Department [2010] EWCA Civ 727, in particular in the judgment of Munby LJ at paragraphs 51-54. At paragraph 53 Munby LJ cited the earlier and well known decision of the Court of Appeal in R(Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1409 at paragraph 50. In that case, Laws LJ said:

i. "There is no duty of general disclosure in judicial review proceedings. However there is – of course – a very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide. The real question here is whether in the evidence put forward on his behalf the Secretary of State has given a true and comprehensive account of the way the relevant decisions in the case were arrived at. If the court has not been given a true and comprehensive account, but has had to tease the truth out of late discovery, it may be appropriate to draw inferences against the Secretary of State upon points which remain obscure."

122. To that general proposition Munby LJ added these salutary words in a context like the present where what is at stake is the personal liberty of the individual. At paragraph 54 he said:

i. "Where liberty is in issue the court should not be left to try and make findings as best it can on inadequate evidence."_

123. None of this should come as any surprise to the Treasury Solicitor's department, recently renamed the Government Legal Department. After all, as is well known, in 2010 the Treasury Solicitor issued Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings. It is unnecessary for present purposes to recite that document at length. It is well known and reference should be made to it. However, even a cursory glance at, for example, paragraph 1.2 which has the heading: Duty of candour in judicial review, makes it clear in several bullet points that (1) the duty of candour continues to apply throughout the proceedings; (2) the duty is information based and not restricted to documents; and (3) the duty extends to documents/information which will assist a claimant's case and/or give rise to additional (and otherwise unknown) grounds of challenge.

124. This reflects the underlying principle to which the Master of the Rolls made reference in ex parte Huddleston that public law litigation must not be conducted in the same way that, for example, private commercial litigation may properly be conducted. The task of public authority defendants and, in particular, the central government, is not to try to win a case at all costs, for example, by answering questions strictly accurately but keeping its cards close to its chest otherwise. This is essential for the maintenance of the rule of law in this country, something everyone can take pride in, including the government. This is one respect in which the duty of candour and cooperation is quite

distinct from the duty of disclosure of documents. As is well known, ordinary disclosure does not in fact apply to judicial review proceedings. However, it is precisely for that reason that the duty of candour and cooperation does. It is the task of those representing public authority defendants to assist the court to understand fully the decision making process under challenge. I would reiterate what is said in the Treasury Solicitor's Guidance which, in turn, is based on well established authority, that the court must not be left guessing about some material aspect of the decision making process.

125. In my view, on the facts of this case, there was insufficient compliance with these duties. However, I have come to the conclusion, having considered in particular the oral evidence of the key witnesses that this was not due to any deliberate attempt to mislead the court. Rather, in my view, it flowed from the combination of a number of events and omissions when taken together. For example, witness statements had to be filed in early August at a time when the substantive hearing was due to take place, on 6 August 2014. At that time Mrs Brewer was absent on honeymoon. However, it is unfortunate that even after the hearing in August had been adjourned and even after other witnesses did file witness statements in January this year with a view to preparing for the hearing in February 2015, no one cross checked Mr Dellaloglu's witness statement in this case. In particular, it is unfortunate that Mrs Brewer, who was Mr Dellaloglu's line manager, did not on her return from honeymoon or at any time before 26 February 2015 check the witness statement filed in this case and compare it to her own witness statement in the Zeregergis case. She apologised to this court.

126. It would also appear that as was fairly and candidly accepted by both counsel and solicitors in this case, that some responsibility may fall upon them by way of omission. Again, I stress that I have no reason to believe that anyone has attempted deliberately to

mislead this court. However, with hindsight, they would appear to accept that they should have looked into these matters more closely, and drawn the witnesses' attention to the fact that there was not necessarily the same evidence being given in these two cases which both related to Eritrea.

127. Conclusion.

128. For the reasons I have given, this claim for judicial review succeeds in that I hold the claimant's detention was unlawful from 6 November 2013 until his release on 6 August 2014. I have considered, as I was asked to by the parties, the issue of liability only at this stage. I do not think it appropriate to make any findings or directions as to the question of aggravated damages which was briefly flagged in submissions on behalf of the claimant last week. This is because I have not heard full argument on that and because, as I have said, I have been concerned at this already lengthy and unusual hearing, with the question of liability only. I will consider submissions as to the next steps.

129. MR GOODMAN: My Lord, I have an application for my costs.

130. MR JUSTICE SINGH: Yes. Now, before we proceed, I am very conscious that Ms Apps, of course, has not been counsel in this case, and indeed I am grateful to her for appearing today at short notice. And I am very conscious that it may be that further directions have to be given as to the appropriate time table for any submissions that need to be made on any consequential matters. Can I deal with that procedural issue first.

131. MS APPS: Yes, my Lord, that would be my preference. Counsel instructed in this case, Julie Anderson, is currently in Luxembourg.

132. MR JUSTICE SINGH: Yes, she told me that on Friday.

133. MS APPS: I understand she is due back shortly; it is not that she is away for a

very long period.

134. MR JUSTICE SINGH: Right.

135. MS APPS: But I was first instructed in this matter today. I knew about the Zeragurgis[?] case but I don't know a great deal about this case.

136. MR JUSTICE SINGH: Yes.

137. MS APPS: But what I would say as regards to the costs is that this is, as I understand it, the claimant includes a claim for damages.

138. MR JUSTICE SINGH: Yes.

139. MS APPS: Which has not yet been determined by the court. I understand that a no costs application was made, I think it was, but you will know better than I do my Lord, the end of August or beginning of September.

140. MR JUSTICE SINGH: It was. I dealt with it on 18 September.

141. MS APPS: Indeed. And the thing about this costs application at this stage before damages have been determined, it might be felt to be rather premature.

142. MR JUSTICE SINGH: I am not inclined to agree with that, although obviously I would hear submissions. At the moment I just want to deal with the procedural steps. Normally, as you know, if Ms Anderson had been here, there would be no difficulty, we would simply proceed to deal with all consequential matters now by way of oral application, but of course I am sympathetic of the position you find yourself in and I think in the exchange of email correspondence there has been during the course of today with my clerk, it has been suggested that I might lay down a tight timetable for written submissions on consequential matters, but it would have to be tight because I am due to be away from this court after the end of this week. So, if possible, I would have resolved issues by the end of this week if possible. Can I suggest, first of all, Mr Goodman, you

are going to, I think, have carriage of any draft order to reflect what I have said so far.

143. MR GOODMAN: Yes.

144. MR JUSTICE SINGH: For example, if there is any declaration as to the period of unlawful detention that needs to be formally expressed and so on and so forth. So can you undertake to carry that process forward?

145. MR GOODMAN: Yes, my Lord.

146. MR JUSTICE SINGH: Thank you. Secondly, in so far as you have an application for costs to make, would you be content for me to deal with that in writing?

147. MR GOODMAN: Let me just take instructions.

148. MR JUSTICE SINGH: Of course.

149. MR GOODMAN: Well, my Lord, I fully appreciate the defendant's difficulty given Ms Anderson's non-availability.

150. MR JUSTICE SINGH: yes.

151. MR GOODMAN: I have put in a note which I understand has made its way to your Lordship, setting out the main points that I was intending to rely on.

152. MR JUSTICE SINGH: Right. I have received it but I have not yet read it.

153. MR GOODMAN: My Lord, I am in your hands as to one of two courses. Either to improve that and submit it at some point - by the end of tomorrow is perfectly feasible.

154. MR JUSTICE SINGH: That is what I would invite you to do. I will hear from Ms Apps in a moment. But it I were to invite you to perfect that. I won't read it. But to make your application in writing by 4 pm tomorrow.

155. MR GOODMAN: Yes, that is fine, my Lord.

156. MR JUSTICE SINGH: And what I would then wish to direct, subject to your

observations, Ms Apps, is if the Secretary of State were able to file and serve a written response to that application 24 hours later, 4 o'clock?

157. MS APPS: By the end of Wednesday?

158. MR JUSTICE SINGH: Yes.

159. MS APPS: I will just ask my solicitor to step outside just to see when Ms Anderson is back from Luxembourg.

160. MR JUSTICE SINGH: Of course. That is what I would like to direct at the moment. Of course, if that is unfeasible, I am never going to ask anyone to do something which is impossible. No court should ever direct that. But that is what I would like at the moment to achieve.

161. MR GOODMAN: In effect that would give two days to the defendant since the submissions are very full.

162. MR JUSTICE SINGH: Exactly. And I would then do my best to reach a decision in writing by the end of this week. I am not due to sit in the Administrative Court for the rest of this week, but I will do my best to make time to achieve that. So that would, subject to any further representations about timetable, that would deal with the question of costs, I think. Are there any other matters that will need to be dealt with, possibly in writing?

163. MS APPS: My Lord, I anticipate that there might well be an application for permission to appeal.

164. MR JUSTICE SINGH: Right.

165. MS APPS: Which, if I may suggest, is included in the same document that contains the submissions on the order for costs, provided Ms Anderson is back by Wednesday.

166. MR JUSTICE SINGH: Yes. That is fine in principle, but of course I won't get your application, if one is made, until Wednesday, so what I think I will have to direct is that if there is to be an application for permission to appeal, that must be made in writing by 4 pm and served on the claimant on Wednesday, 4 pm on Wednesday. And then, Mr Goodman, you can have until 4 pm on Thursday to file any written response that you wish to on that.

167. MR GOODMAN: I am grateful, my Lord. The only other thing, as your Lordship has indicated, there is a second part to this matter which will be a determination of quantum.

168. MR JUSTICE SINGH: Indeed.

169. MR GOODMAN: As trailed previously, I would hope that the defendant will engage in some negotiation on the level of damages.

170. MR JUSTICE SINGH: Exactly.

171. MR GOODMAN: And that a further hearing can be avoided.

172. MR JUSTICE SINGH: Yes.

173. MR GOODMAN: However, if agreement is not reached, we would ask for some form of long stop, for example, 2 months, by which time the parties come to court.

174. MR JUSTICE SINGH: Yes. That seems to me to be reasonable. Ms Apps, do you have any submissions to make about that?

175. MS APPS: No, my Lord. It wouldn't make sense to have it listed too soon.

176. MR JUSTICE SINGH: No. What I would ask, therefore, and as I said earlier, I will ask Mr Goodman to take carriage of the drafting of the order but, of course, what I would like to see is if possible it is agreed by counsel, and, no doubt, Ms Anderson will be consulted on this as well. But I what I would like is if, Mr Goodman, if you can

include in your draft order a clause which reflects what we have just said.

177. MR GOODMAN: Yes, my Lord.

178. MR JUSTICE SINGH: And, therefore, I would suggest that it should be, well, does it need to be reserved to me for further directions, if that becomes necessary? I am slightly reluctant to put that in the order because I am now likely to be out of London for much of the summer and early Autumn.

179. MR GOODMAN: My Lord, it doesn't need to be reserved to your Lordship, and I will try to agree a degree of anticipated directions for 2 months and a path forward --

180. MR JUSTICE SINGH: Exactly. Of course, and I am well aware, as both counsel are, that from experience often in these sorts of cases directions can be agreed. But, of course, if anything needs to be adjudicated by the court, that can be done in due course and I make it clear, as I hope you will in the order you draft, that the case is not thereafter reserved to me. May I check with counsel if there is anything else at this stage?

181. MS APPS: If I might just have a minute to check with my solicitor who is on the telephone to Ms Anderson's clerk.

182. MR JUSTICE SINGH: Yes, of course.

183. MS APPS: Just while I think of it, I imagine that both parties would be wanting transcripts of this judgment that was handed down and that would be in the order?

184. MR JUSTICE SINGH: In my experience, that is usually done informally. I don't think it has to be directed, as an order. But certainly I am expecting that there will be, in due course, a draft shown to me for my amendment and approval, and then it will be finalised.

185. MR GOODMAN: Yes, my Lord. I don't think there is need for a direction on

that.

186. MR JUSTICE SINGH: No, that is quite normal.

187. MR JUSTICE SINGH: Do you want me to wait longer for your solicitor?

188. MS APPS: I thought it would be a matter of seconds.

189. MR JUSTICE SINGH: If it's going to be longer than a few seconds, then I am going to rise.

190. MR GOODMAN: My Lord, just informally as to the draft order, I will endeavour to try and agree the form of that by Thursday at 4 pm so that you can everything simultaneously.

191. MR JUSTICE SINGH: That is very helpful, thank you.

192. MS APPS: I have just been informed that Ms Anderson is not back until Thursday morning.

193. MR JUSTICE SINGH: Right. Don't worry. We will find a practical solution to this, all right. We will give everyone a bit more time, I hope. Can I suggest this: that I anticipate that I am going to need to be here briefly on the morning of 2 June before I travel elsewhere. And so I will need to be in a position where I can consider the documents on that morning, without fail, and make a decision in writing on that morning. So if we work backwards from that date, which is Tuesday, 2 June. Mr Goodman, can you make your application for costs by the end of this week?

194. MR GOODMAN: Yes, my Lord.

195. MR JUSTICE SINGH: So 4 pm on Friday, 22 May. I hope that nobody is going to say that next week they are away on holiday as well. So when could the Secretary of State respond to the application for costs? In the middle of next week?

196. MS APPS: Shall we say 4 pm on the next Thursday, 28 May?

197. MR JUSTICE SINGH: Yes, all right, 4 pm on Thursday, 28 May. Also by then you have to make any application for permission to appeal. And then, Mr Goodman, can you reply to those documents by 4 pm on Monday 1 June?

198. MR GOODMAN: Yes.

199. MR JUSTICE SINGH: I am actually in London on Monday 1, I am at a training course all day. But I will try and check my emails at the end of business that day, so I will need, and I will be expecting, to have these documents. I hope I have been realistic, and I hope I have been fair to both sides. And I will make a decision on the morning of 2 June, all right? Is there anything else?

200. MS APPS: No, my Lord.

201. MR JUSTICE SINGH: Thank you all very much.